

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

RAYMOND BLAKELY	:	CIVIL ACTION
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	:	
Petitioner,	:	
	:	
v.	:	
	:	NO. 00 CR 260-1
	:	01 CV 5159
UNITED STATES OF AMERICA	:	
	:	
Respondent.	:	

Newcomer, S.J.	July , 2002
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**O P I N I O N**

Presently before the Court is Petitioner's Motion to Vacate, Set Aside, or Correct Sentence. For the reasons set forth below, Petitioner's Motion is denied.

**BACKGROUND**

On March 29, 2000, pursuant to a Pennsylvania State Parole Arrest Warrant, the pro se Petitioner was arrested in his Philadelphia apartment. Officers obtained consent to search the premises and found an unloaded 9mm Makarov semi-automatic pistol, drug paraphernalia and 132 grams of cocaine in various forms.

Petitioner was charged with two counts of possession with intent to distribute cocaine, both in violation of 21 U.S.C. § 841(a)(1). The first count of possession with intent to distribute over 50 grams of cocaine carried a minimum mandatory sentence of 10 years imprisonment to life. The second count of possession with intent to distribute, in the quantity found, did not carry a minimum mandatory sentence. There was no charge for possession of

a firearm in furtherance of a drug trafficking offense under 18 U.S.C. § 924(c).

On July 12, 2000, Petitioner entered into a plea agreement fully aware he was waiving his right to a trial by jury. The plea agreement provided for a three level decrease in the base level offense pursuant to Petitioner's cooperation and execution of the plea agreement. In accordance with the agreement, he pleaded guilty to the two counts of possession with intent to distribute cocaine and stipulated to possession of a firearm in furtherance of a drug trafficking offense, thereby increasing the base offense two levels pursuant to United States Sentencing Guideline 2D1.1(b)(1). Therefore, the net effect of the agreement was a one level reduction in Petitioner's base level offense.

Petitioner failed to fully cooperate with officials and, consequently, on November 9, 2000, was sentenced to 135 months incarceration. Now, having failed to appeal his conviction or sentence, he moves to vacate, set aside or correct his sentence under 28 U.S.C. § 2255. Petitioner claims his counsel offered ineffective assistance when he failed to move to suppress evidence gained from the search. Specifically, Petitioner claims evidence offered at trial was obtained as a result of coercion and improper procedure. In addition, Plaintiff alleges that counsel inappropriately failed to object to the sentencing guideline enhancement.

### DISCUSSION

This Court must deny Petitioner's Motion as he failed to previously apply for relief, as required by 28 U.S.C. § 2255, and is unable to show cause for such a failure. Petitioner attempts to justify his failure to previously appeal by arguing ineffective assistance of counsel. Petitioner's reasoning is flawed and, therefore, so too is his claim.

28 U.S.C. § 2255, provides that a prisoner who claims he is being held in violation of the Constitution or laws of the United States, may petition "to vacate, set aside or correct the sentence." In order for such a petition to be considered, the petitioner must have first directly applied for relief with the sentencing court. 28 U.S.C. § 2255. A § 2255 petitioner seeking relief for trial errors who did not seek such relief on direct appeal, "must show both (1) 'cause' excusing his double procedural default and (2) 'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 167-169 (1982).

Petitioner attempts to argue ineffective assistance of counsel as sufficient "cause" excusing his failure to appeal directly. To show ineffective assistance of counsel Petitioner must demonstrate (1) that his counsel's performance was deficient in that counsel did not "function[] as the 'counsel' guaranteed the defendant by the Sixth Amendment" and (2) this deficient

performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). Scrutiny of counsel's performance is highly deferential and the court "indulge[s] a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, the challenged action 'might be considered sound trial strategy.'" Id. at 689 (citing Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

Petitioner alleges two points in support of his claim of ineffective assistance of counsel. First, Petitioner alleges his counsel acted deficiently when he failed to move to suppress evidence from, what Petitioner now claims to be, an involuntary and illegal search of his apartment. Second, Petitioner alleges his counsel acted deficiently when failing to object to the guideline enhancement in the plea agreement for possession of a firearm in furtherance of a drug trafficking offense.

Petitioner's first contention fails for a number of reasons. If counsel had moved to suppress the evidence gained from the search or objected to the guideline enhancement of two base levels for possession of a firearm in furtherance of a drug trafficking offense, Petitioner may have destroyed his eligibility for the plea agreement. The agreement reached between Petitioner and the Government was based on Petitioner's stipulation to this evidence. Specifically, paragraph 9(c) of the Government's Plea

Memorandum indicates that the, "parties agree and stipulate that the defendant possessed a dangerous weapon...."

Moreover, counsel's efforts to suppress the evidence gained from the search would have likely been an uphill battle. To suppress this evidence counsel would have to show Petitioner's consent was not voluntary, Schneckloth v. Bustamonte, 412 U.S. 218 (1973); United States v. Wright-Barker, 784 F.2d 161, 176 (3d Cir. 1986), or would have to struggle with Petitioner's fruitless claim that the search was conducted under improper procedures. United States v. Payne, 119 F. 3d 637, 643-44 (8th Cir. 1997)(law enforcement officers are not required to advise someone of his rights prior to consent).

Petitioner's second claim of counsel's deficient performance (failure to object to the guideline enhancement of possession of a firearm in furtherance of a drug trafficking offense) is likewise unconvincing. Petitioner is correct when he claims he was not initially charged with possession of a firearm in furtherance of a drug trafficking offense. He is also correct in pointing out that its presence in the plea agreement increased his base level offense by two levels. However, Petitioner fails to mention that the plea agreement, which included the enhancement, afforded Petitioner an overall three level decrease in his base level offense. Therefore, by agreeing to the enhancement, the Petitioner reaped a net result of a one level decrease in his base

level offense. Furthermore, the enhancement was justified as the weapon was found in the same room as the cocaine. U.S. Sentencing Guidelines Manual § 2D1.1(b)(1), ("[a firearm enhancement] is applicable if the weapon was present, unless it was clearly improbable that the weapon was connected with the offense," ). Therefore, it is easily understood why Petitioner's counsel and Petitioner himself not only waived any objection to the firearm enhancement but also consented to its application here. In the end, although Petitioner failed to fully cooperate with the Government in the execution of the plea agreement, he was sentenced to 135 months, near the bottom of the guideline range for his offenses, which included a maximum sentence of life imprisonment.

This Court need not delve any further into whether Petitioner's alleged ineffective assistance of counsel meets the two prong Strickland standard as it is abundantly clear that Petitioner has failed to satisfy prong one. Having failed to meet the Strickland standard, Petitioner is unable to show sufficient cause for his failure to launch a direct appeal on the issues discussed above. Therefore, Petitioner's claim fails.

AN APPROPRIATE ORDER SHALL FOLLOW

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Clarence C. Newcomer, S.J.